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Nos. 07-394 and 06-1666

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In The
Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Petitioners,

v.

SANDRA K. OMAR AND AHMED S. OMAR,
as next friends of Shawqi Ahmad Omar,

Respondents.

MOHAMMAD MUNAF, et al.,

Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Supreme Court Rule 44.1, Mohammad Munaf, Shawqi Omar, and their next friends ("the Habeas Petitioners") respectfully seek rehearing of Part IV.A of this Court's decision issued June 12, 2008 ("the Opinion"). Habeas petitioners are acutely aware of the extraordinary nature of such relief. But rehearing is warranted in this case for two reasons: the Opinion's assumption of facts in the absence of a record or decision below, and the grave and unintended repercussions that the Opinion will have for overseas Americans' core Due Process rights.

First, the crux of the Court's argument appears to depend on factual assumptions that no lower court adjudicated, and that remain hotly contested. Most importantly, the Opinion is centered on the existence of an Iraqi interest in criminal prosecution of the Habeas Petitioners. The evidence in the record does not adequately substantiate this interest as to either Mr. Munaf or Mr. Omar. Accordingly, the Court should grant rehearing to allow adjudication of these issues and remand to lower federal courts for appropriate factual determinations.

Even if the Court were unwilling to rule for the habeas petitioners on this ground, the Court should at the very least correct the factual assertions in the opinion that are not supported by the record. As the Court noted, the Habeas Petitioners may lodge challenges under the substantive component of the Due Process Clause and the Foreign Affairs Reform and

Restructuring Act of 1998 ("FARR Act"), div. G, 112 Stat. 2681-761, such that the state of the factual record may be relevant in regard to those claims. *See, e.g.*, *Securities & Exch. Com. v. Dexel & Co.*, 349 U.S. 910, 913 (1955); *Slochower v. Bd. of Higher Educ.*, 351 U.S. 944 (1956); *see also Maryland for the Use of Levin v. United States*, 382 U.S. 159 (1965) (granting rehearing as to clarify the need for further proceedings below on unresolved issues).

Second, the Court should grant this petition for rehearing in light of the consequences of its Opinion for core constitutional rights of U.S. citizens overseas. Even as limited by the Court, the Opinion may have substantial and deleterious unintended effects on large categories of innocent persons swept up into military detention, including dependents of military personnel, journalists, and aid workers. It would allow the Government to avoid meaningful review when detaining a citizen overseas merely by claiming an intention to transfer the citizen to another sovereign. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion) (noting the "very real" risks to constitutional rights of journalists and humanitarian workers in the context of foreign countries in which conflict activities are ongoing). The risk of erroneous deprivation of liberty does not diminish because midway through a detention the Government decides to hand a person over to another sovereign that has no interest in prosecuting him or her.

I. The Court Should Grant Rehearing In Order To Correct Factual Misapprehensions In Its Opinion.

Both the Court's opinion and Justice Souter's concurring opinion stress the fact-bound nature of the June 12, 2008, decision. *Munaf v. Geren*, 128 S. Ct. 2207, 2221 (2008); *id.* at 2228 (Souter, J., concurring). The Opinion, however, relies on factual assumptions regarding several sharply contested matters crucial to the final judgment without the benefit of briefing, a hearing, or any findings below. The Court should therefore grant rehearing and clarify that its Opinion is not a substitute for whatever findings may be made in the future by the lower courts. It should then remand for an adjudication of facts on which the judgment depends. At the very least, it should clarify that the Opinion has not substituted legal conclusions for whatever findings lower courts make in the future.

In dismissing a habeas petition on the merits "for failure to state a claim," *Munaf*, 128 S. Ct. at 2220 (internal citation omitted), *the habeas petitioner's* allegations must be "taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The Opinion inverts this standard by relying on unsupported assertions by the Government as the ground of decision. This is of special concern because, as the Court recognized, it was "proceed[ing] further" than any of the lower courts in these cases – i.e., reaching issues on which no findings of fact exist. *Munaf*, 128 S. Ct. at 2219.

Of central importance, the Opinion relies on Government assertions about the existence of ongoing Iraqi criminal proceedings that have yet to be substantiated by record evidence. It states that "[t]here is . . . no question that Munaf is the subject of ongoing criminal proceedings and that Omar would be but for the present injunction." *Id.* at 2221. The Opinion also asserts that "Omar and Munaf are being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts." *Id.* at 2223. With respect to Mr. Munaf, the Opinion relies on the recent judgment of the Iraqi appellate court *acquitting* Mr. Munaf of wrongdoing. *Id.* at 2223 (citing *In re Hikmat*, No. 19/Pub. Comm'n/2007). With respect to Omar, the Opinion relies on a referral by the Multi-National Force-Iraq (MNF-I) for prosecution, and not on any evidence of Iraqi activity. *Id.* at 2211. Under even the most lax view of the record, these data points cannot sustain the factual conclusions relied on by the Court as the basis for its decision.

Simply put, the record does not show that Iraqi authorities intend to investigate or prosecute Mr. Omar, or that they still intend to proceed with criminal proceedings against Mr. Munaf. The record shows only that the U.S. Government wishes to be rid of its own citizen detainees – and to avoid federal habeas review – by moving them to another sovereign's custody.

As to Mr. Munaf, the Opinion relies on an Iraqi judgment *acquitting* him to justify his continued detention. *Munaf*, 128 S. Ct. at 2223. The Opinion

correctly notes that this Iraqi judgment of acquittal directs that *all* the defendants in that case, including Mr. Munaf, "remain in custody pending the outcome" of unspecified future proceedings. *Id.* (internal citation omitted). But the Opinion then draws the unwarranted inference that the Iraqi courts have an interest in a new prosecution of Mr. Munaf. Rather than reaching that premature conclusion, the Court should have remanded back to the district court to ascertain whether Mr. Munaf's detention, in fact, remains "an integral part of the Iraqi system of criminal justice," *id.*, (if it ever was), or, as petitioner asserts, a case of U.S. officials holding a U.S. citizen without sufficient cause and without any real Iraqi interest.

In Mr. Omar's case, the only salient piece of evidence is a declaration from a U.S. government official stating that "MNF-I ascertained that the Iraqi judiciary would proceed with charging Mr. Omar in the Central Criminal Court of Iraq (CCCI)." Petition for Writ of Certiorari at 104a, *Omar v. Geren*, 128 S. Ct. 2207 (2008) (No. 06-1666). It is only on the basis of this MNF-I decision – not any decision or action by the Iraqi government – that the Government's declarant has asserted that "Mr. Omar is currently pending an Investigative Hearing before the CCCI." *Id.* There is no evidence at all in the record that *Iraq* wishes to prosecute Mr. Omar. Nothing in the record even hints at an Iraqi interest in either investigation or prosecution. Rather, it shows only that *the United States* wants to deposit Mr.

Omar in an Iraqi jail. Notably, the Iraqi government made no progress on this investigation in the months and years since the MNF-I "ascertained" its intentions.[1]

The Court should at a minimum clarify its Opinion on these matters lest the courts below confuse legal holdings with factual findings. The Court has an interest in avoiding any such confusion because the question whether there is indeed any Iraqi intention to prosecute Mr. Munaf or Mr. Omar is the centerpiece of the Court's analysis.[2] Indeed, Justice Souter's concurrence makes clear that the "essential" "circumstances" of the Opinion's holding include the Iraqi decision to prosecute. *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring).

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[1] Notably, the Court finds that a *trial* against Mr. Omar would be barred by the disputed injunction, *Munaf*, 128 S. Ct. at 2224 n.4, but does not indicate that *investigation* by the CCCI was ever proscribed.

[2] The Court also notes in passing a "concer[n] about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad." *Id.* at 2224. But Mr. Munaf was seized while working as a journalist, and Mr. Omar was arrested at his home, where he was living with his ten-year-old son. Neither Mr. Omar nor Mr. Munaf was bearing arms at the time of his arrest. Neither of them is even "alleged to have committed hostile and warlike acts within the sovereign territory of Iraq during the ongoing hostilities." *Id.* at 2227. As the Government conceded in its briefs, and again at oral argument, this is not a case, like *Hamdi*, about battlefield captures. *See, e.g.*, Transcript of Oral Argument at 67, *Munaf v. Geren*, 128 S. Ct. 2207 (2008) (Nos. 07-394 & 06-1666) ("we don't take the position this is like a battlefield situation.").

Moreover, misinterpretation of the Court's opinion is made all the more likely because it fails in several key passages to make clear that – since the petitions were dismissed without adversarial adjudication – none of the statements made therein dictate the outcomes that would occur if the facts turned out to be different from those assumed by the Court for purposes of its ruling.

II. The Court Should Grant Rehearing In Light Of The Wider Systemic Effects Of Its Opinion.

In an earlier landmark case concerning the rights of U.S. citizens seized and detained by their own government overseas, the Court granted rehearing because of the larger systemic consequences of its decision. *See Reid v. Covert*, 352 U.S. 901 (1956) (granting rehearing). As in *Reid*, this case casts a shadow larger than its immediate impact on the Habeas Petitioners. It imperils the liberty of citizen journalists, aid workers, and the dependents of military personnel – all of whom voluntarily travel to foreign countries, and all of whom may well find themselves in the custody of their government and threatened with transfers to the territorial sovereign. In this regard, the opinion invites circumvention of the principles set forth in this Court's recent judgment in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For these reasons, the Court should reconsider its judgment in this case.

Like *Reid*, this is a case about the most fundamental of Americans' liberty interests: the freedom from bodily restraint by one's own government. Mr. Omar and Mr. Munaf have each been detained in the custody of their own government for more than three years. For most of that time, there was not even a hint of an Iraqi criminal process. (Even now, the evidence of continuing Iraqi interest in prosecuting either of them in the absence of pressure from the United States is slim to non-existent. *See supra*). The Court has long vindicated citizens' rights against unconstitutional action overseas. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. 115, 133 (1951) (applying Takings Clause to an extraterritorial taking); *see generally* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L. J. 463, 478 n.86 (2007) (collecting cases). It should not cease to do so now simply because the Government has found an ally willing to shelter it from judicial review, especially given the ever-growing class of citizen aid workers, journalists, and military dependants overseas who would be affected.

The Court stated three years ago in *Hamdi* that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. at 536 (plurality opinion). The rule announced in these cases risks rendering that wisdom a nullity for some important class of U.S. citizens overseas whenever the Government can persuade another government to move forward with a criminal prosecution.

CONCLUSION

For the foregoing reasons, Habeas Petitioners respectfully ask this Court to grant their petition for rehearing.

Respectfully submitted,

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Dated: July 7, 2008

CERTIFICATE OF COUNSEL

Under signed counsel certifies that this Petition for Rehearing is presented in good faith and not for the purposes of delay.

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